Jumsar (Sarawak) Sdn Bhd v Robin Dockyard & Engineering Sdn Bhd and another case

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NOS KCH-24C (ARB) 1/2 OF 2020 (HC I) AND KCH-24NCvC-2/1 OF 2020 (HC2)
ALEXANDER SIEW JC
18 FEBRUARY 2021

Building and Construction Law — Construction contract — Adjudication — Application to set aside adjudication decision under Construction Industry Payment Adjudication Act 2012 ('the CIPA 2012') — Application for enforcement of adjudication decision under the CIPA 2012 — Whether court could set aside adjudication decision — Whether adjudicator acted independently or impartially — Whether there was denial of natural justice — Whether adjudicator exceeded his jurisdiction — Construction Industry Payment Adjudication Act 2012, s 28

There were two applications in this case, the first application was by Jumsar (Sarawak) Sdn Bhd ('Jumsar') by way of originating summons (encl 1) to set aside an adjudication decision against it and in favour of Robin Dockyard & Engineering Sdn Bhd ('Robin Dockyard'). In addition, Jumsar had applied for a stay (encl 3); and (b) The second application, by Robin Dockyard was by way of originating summons (encl 1) for an enforcement of the adjudication decision under s 28 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPA Act 2012'). The various applications referred to were heard together. Jumsar was the subcontractor for the Kuching Waterfront Darul Hana Musical Fountain Project ('the project). Robin Dockyard was a su-contractor of Jumsar, subcontracted to supply and install a floating pontoon ('the floating pontoon'). The primary dispute between the parties which led to the adjudication proceedings and the instant litigation were summarised as follows: (a) according to Jumsar, it was part of the contract between the parties that Robin Dockyard was to supply and install a protection screen for the floating pontoon; and (b) according to Robin Dockyard, in respect of the protection screen, Robin Dockyard was only contracted to install the protection screen and it was for Jumsar to supply the protection screen for Robin Dockyard to install. In addition to the primary dispute, Jumsar also alleged that the floating pontoon had various defects at the time of delivery, allegations which Robin Dockyard had denied. The adjudicator ruled in favour of Robin Dockyard on both issues and ordered Jumsar to pay Robin Dockyard the sum claimed by Robin Dockyard. In its originating summons (encl 1) and supporting affidavit (encl 2), Jumsar claimed the adjudicator had acted in breach of natural justice and in excess of jurisdiction. There were two issues of

contention between the parties in the adjudication proceedings. The primary issue was whether under the contract between the parties, Robin Dockyard was to supply and install a protection screen for the floating pontoon or was merely to install a protection screen (with the provision of the protection screen the responsibility of Jumsar or others). The secondary issue was whether at the time of delivery of the floating pontoon by Robin Dockyard to Jumsar, the floating pontoon had any defects.

Held, dismissing Jumsar's application to set aside the adjudication decision and application for a stay; and allowing Robin Dockyard's application to adjudication decision:

(1) The certificate of practical completion ('the CPC') was merely one of the factors the adjudicator had taken into consideration, in ruling in favour of Robin Dockyard on the secondary issue whether there were defects. The adjudicator did not rely on the CPC in his reasoning and ruling in favour of Robin Dockyard on the primary issue whether Robin Dockyard was to supply the protection screen, on top of installing the screen. Thus, learned counsel was erroneous in saying to the effect that the adjudicator had based his whole decision on the CPC, when the CPC was merely one of the factors the Adjudicator had taken into account in his ruling on the secondary issue. This court was unable to agree with learned counsel's contention that the fact the adjudicator did not ask the parties to comment on the CPC, amounted to a breach of natural justice (see paras 19–22).

(2) The fact that the CPC was issued to the main contractor by the client and that the parties might not have been privy to the issuance of the CPC, was completely irrelevant to the issues in the adjudication proceedings. Not only was it completely irrelevant, adjudicators with their experience and expertise in construction matters, would know who a CPC would be issued to and by whom, and whether subcontractors would be privy to the issuance. Therefore, the comment about the issuance of the CPC and whether the parties would be privy to the issuance, if the comment had been made, would be stating something that is not only irrelevant, but also obvious (see paras 32–34).

(3) On the argument that the CPC 'maybe a CPC for sectional completion of the Project', the court noted that Jumsar never said that in its affidavits. This argument was pure speculation from the Bar by learned counsel. The court found this argument to be devoid of any logic or basis. If indeed the CPC was merely a sectional CPC not relatied to the floating pontoon, Jumsar should simply put forward the evidence showing so in its affidavits, instead of having its learned counsel engage in unfounded speculation. Thus, a CPC was not conclusive evidence that there were no defects, in that there could be defects that were not patent ie latent.

Furthermore, it was trite a breach of natural justice had to be material before a court would set aside any part of an adjudication decision impacted by the breach. Looking at the adjudication decision as a whole, it was clear to this court the adjudicator had considered the weight of evidence to be against Jumsar on the secondary issue, even without the CPC (see paras 35–36, 38–39, 41, 44 & 47).

(4) It could not be that just because the adjudicator ruled in favour of one side, it would amount to a breach of natural justice for the losing side. Here, the adjudicator in the adjudicating decision had considered the parties' respective case before deciding in favour of Robin Dockyard. There was nothing in the adjudicating decision to suggest the parties had been deprived of the opportunity to present their case or that the adjudicator had failed to consider the parties' respective case before deciding. A party may disagree with the reasoning or the decision, but to say this amounted to a breach of natural justice would require several leaps of deductive logic which no court will countenance (see paras 51–52, 55 & 59).

(5) As Jumsar's application for a stay and opposition to Robin Dockyard's application to enforce the adjudication decision was premised on Jumsar's application to set aside the adjudication decision and the same grounds as stated in the application to set aside, the court in dismissing Jumsar's application to set aside the Adjudication Decision also dismissed Jumsar's application for a stay and allowed Robin Dockyard's application to enforce the adjudication decision (see para 60).

[Bahasa Malaysia summary

Terdapat dua permohonan dalam kes semasa , permohonan pertama adalah oleh Jumsar (Sarawak) Sdn Bhd ('Jumsar') melalui saman pemula (lampiran 1) untuk mengetepikan keputusan adjudikasi terhadapnya dan kepada Robin Dockyard & Engineering Sdn Bhd ('Robin Dockyard'). Seterusnya, Jumsar telah memohon untuk penggantungan (lampiran 3); dan (b) Permohonan kedua, oleh Robin Dockyard melalui saman pemula (lampiran 1) untuk penguatkuasaan keputusan adjudikasi berdasarkan s 28 Akta Pembayaran dan Adjudikasi Industri Pembinaan ('APAIP 2012'). Kesemua permohonan yang disebutkan telah didengar bersama. Jumsar adalah subkontraktor untuk Kuching Waterfront Darul Hana Musical Fountain Project ('Projek tersebut'). Robin Dockyard adalah subkontraktor Jumsar, dengan subkontrak untuk membekal dan memasang pontun apungan ('pontun apungan tersebut'). Pertikaian utama antara pihak-pihak yang membawa kepada prosiding adjudikasi dan tindakan litigasi semasa diringkaskan sebagai berikut: (a) menurut Jumsar, ianya adalah sebahagian dari kontrak antara pihak-pihak bahawa Robin Dockyard membekalkan dan memasang layar perlindungan untuk Pontun Apungan tersebut; dan (b) menurut Robin Dockyard, berkenaan dengan layar perlindungan, Robin Dockyard hanya dipersetujui

untuk memasang layar perlindungan dan ianya adalah bagi Jumsar untuk membekalkan layar perlindungan untuk dipasang oleh Robin Dockyard. Sebagai tambahan kepada pertikaian utama, Jumsar juga mendakwa bahawa pontun apungan tersebut mengalami kerosakan pada masa penghantaran, dakwaan yang mana telah dinafikan oleh Robin Dockyard. Adjudikator memutuskan untuk memihak kepada Robin Dockyard atas kedua-dua isu tersebut dan memerintahkan Jumsar untuk membayar Robin Dockyard jumlah yang dituntut oleh Robin Dockyard. Dalam saman pemulanya (lampiran 1) dan afidavit sokongan (lampiran 2), Jumsar mendakwa adjudikator telah bertindak dengan melanggar keadilan semula jadi dan melebihi bidang kuasa. Terdapat dua isu pertikaian antara pihak-pihak semasa prosiding adjudikasi. Isu utama adalah sama ada di bawah kontrak antara kedua-dua pihak, Robin Dockyard adalah untuk membekalkan dan memasang skrin perlindungan untuk pontun apungan tersebut atau hanya untuk memasang layar perlindungan (dengan penyediaan layar perlindungan adalah tanggungjawab Jumsar atau yang lain). Isu kedua adalah sama ada pada masa penghantaran pontun apungan oleh Robin Dockyard kepada Jumsar, pontun apungan tersebut mengalami kerosakan.

Diputuskan, menolak permohonan Jumsar untuk mengetepikan keputusan adjudikator dan permohonan penggantungan; dan membenarkan permohonan Robin Dockyard untuk menguatkuasakan keputusan adjudikasi:

(1) Sijil penyiapan praktikal ('CPC') hanyalah salah satu faktor yang dipertimbangkan oleh adjudikasi, dalam memutuskan untuk memihak kepada Robin Dockyard mengenai isu kedua sama ada terdapat kerosakan. Adjudikator tidak bergantung kepada CPC dalam pertimbangannya dan memutuskan untuk memihak kepada Robin Dockyard mengenai masalah utama sama ada Robin Dockyard akan membekalkan layar perlindungan, selain memasang layar tersebut. Oleh yang demikian, peguamcara yang bijaksana telah terkhilaf dalam mengatakan bahawa adjudikator telah membuat seluruh keputusannya berdasarkan kepada CPC, apabila CPC hanyalah salah satu faktor yang telah dipertimbangkan oleh Adjudikator dalam keputusannya mengenai isu kedua. Mahkamah ini tidak dapat bersetuju dengan hujahan peguamcara yang bijaksana pada fakta bahawa adjudikator tidak meminta pihak-pihak untuk memberi ulasan mengenai CPC, terjumlah kepada pelanggaran keadilan semula jadi (lihat perenggan 19–22).

(2) Fakta bahawa CPC dikeluarkan kepada kontraktor utama oleh majikan dan bahwa pihak-pihak mungkin tidak mengetahui pengeluaran CPC, sama sekali tidak relevan dengan isu-isu dalam prosiding adjudikator. Bukan sahaja ianya sama sekali tidak relevan, adjudikator dengan pengalaman dan kepakaran mereka dalam hal-hal pembinaan, akan mengetahui pada siapa CPC akan dikeluarkan dan oleh siapa, dan sama ada subkontraktor akan mengetahui pengeluaran tersebut. Oleh itu,

ulasan mengenai pengeluaran CPC dan sama ada pihak-pihak akan mengetahui tentang pengeluaran tersebut, sekiranya ulasan telah dibuat, adalah menyatakan sesuatu yang bukan hanya tidak relevan, tetapi juga jelas (lihat perenggan 32–34).

(3) Pada penghujahan bahawa CPC 'maybe a CPC for sectional completion of the Project', mahkamah mendapati bahawa Jumsar tidak pernah mengatakan perkara tersebut dalam afidavitnya. Hujahan ini adalah hanya 'pure speculation from the Bar' oleh peguamcara yang bijaksana. Mahkamah mendapati hujah ini tidak mempunyai logik atau asas. Sekiranya CPC tersebut hanyalah sectional CPC yang tiada perkaitana dengan pontun apungan, Jumsar seharusnya mengemukakan bukti yang menunjukkan perkara tersebut dalam afidavitnya, dan bukannya memohon peguamcaranya memberikan spekulasi yang tidak berasas. Oleh itu, CPC bukanlah keterangan yang konklusif bahawa tidak ada kerosakan, kerana mungkin terdapat kecacatan yang tidak nyata iaitu tersembunyi. Tambahan pula, pelanggaran keadilan semula jadi harus menjadi material sebelum mahkamah mengetepikan setiap bahagian dari keputusan adjudikasi yang dipengaruhi oleh pelanggaran tersebut. Melihat keputusan adjudikasi secara keseluruhan, jelas bagi mahkamah ini bahawa adjudikator telah mempertimbangkan keterangan terhadap Jumsar dalam isu kedua, walaupun tanpa CPC (lihat perenggan 35–36, 38–39, 41, 44 & 47).

(4) Ianya tidak mungkin hanya kerana adjudicator telah memutuskan untuk memihak kepada satu pihak, itu akan dianggap sebagai pelanggaran keadilan semula jadi bagi pihak yang kalah. Di sini, adjudikator dalam memberikan keputusan telah mempertimbangkan kes setiap pihak sebelum memutuskan memihak kepada Robin Dockyard. Tidak ada apa dalam keputusan adjudikasi yang mencadangkan bahwa pihak-pihak telah dihalang peluang untuk mengemukakan kes mereka atau bahawa adjudikator gagal mempertimbangkan kes masing-masing pihak sebelum memutuskan. Satu pihak mungkin tidak setuju dengan alasan atau keputusan tersebut, tetapi untuk mengatakan ia terjumlah kepada pelanggaran keadilan semula jadi akan memerlukan beberapa lompatan logik deduktif yang tidak akan diputuskan oleh mahkamah (lihat perenggan 51–52, 55 & 59).

(5) Oleh kerana permohonan Jumsar untuk penggantungan dan penolakan terhadap permohonan Robin Dockyard untuk menguatkuasakan keputusan adjudikasi adalah berdasarkan kepada permohonan Jumsar untuk mengetepikan keputusan adjudikasi dan alasan yang sama seperti yang dinyatakan dalam permohonan untuk mengetepikan, mahkamah ini menolak permohonan Jumsar untuk mengetepikan keputusan adjudikasi juga menolak permohonan Jumsar untuk penggantungan dan membenarkan permohonan Robin Dockyard untuk menguatkuasakan

keputusan adjudikasi (lihat perenggan 60).]

Cases referred to

Xtreme Engineering Sdn Bhd v Paragon Promenade Sdn Bhd [2019] 1 LNS 113, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 25, 28

Lesley Ling (Loke, King, Goh & Partners Advocates) for the plaintiff.
Alvin Yong (Alvin Yong Advocates) for the defendant.

Alexander Siew JC:

[1] In KCH-24C (ARB)–1/2 of 2020 (HC1), the plaintiff Jumsar (Sarawak) Sdn Bhd ('Jumsar') had applied by way of originating summons (encl 1) to set aside an Adjudication Decision against it and in favour of the defendant Robin Dockyard & Engineering Sdn Bhd ('Robin Dockyard').

[2] In addition, Jumsar had applied for a stay (encl 3).

[3] In KCH-24NCvC-2/1 of 2020 (HC2), Robin Dockyard in turn had applied by way of originating summons (encl 1) for enforcement of the adjudication decision under s 28 of the CIPAA Act 2012.

[4] The various applications referred to above were heard together.

[5] On 12 August 2020 this court dismissed Jumsar's application to set aside the adjudication decision and application for a stay and allowed Robin Dockyard's application to enforce the adjudication decision.

BACKGROUND

[6] Jumsar was the subcontractor for the Kuching Waterfront Darul Hana Musical Fountain Project ('the project').

[7] Robin Dockyard was a subcontractor of Jumsar, subcontracted to supply and install a floating pontoon ('the floating pontoon').

Primary dispute

[8] The primary dispute between the parties which led to the adjudication proceedings and the instant litigation can be summarised as follows:

(a) according to Jumsar, it was part of the contract between the parties that Robin Dockyard was to supply and install a protection screen for the floating pontoon; and

(b) according to Robin Dockyard, in respect of the protection screen, Robin Dockyard was only contracted to install the protection screen and it was for Jumsar to supply the protection screen for Robin Dockyard to install.

Secondary dispute

[9] In addition to the primary dispute, Jumsar also alleged that the floating pontoon had various defects at the time of delivery, which allegations Robin Dockyard denied.

[10] The adjudicator ruled in favour of Robin Dockyard on both issues and ordered Jumsar to pay Robin Dockyard the sum claimed by Robin Dockyard.

Jumsar's grounds for the setting aside

[11] In its originating summons (encl 1) and supporting affidavit (encl 2), Jumsar claimed the adjudicator had acted in breach of natural justice and in excess of jurisdiction.

[12] The relevant part of Jumsar's originating summons is set forth below:

The grounds for this application are, inter alia, as follows:

(a) The adjudicator had made a serious mistake in his findings of fact. The adjudicator erred when he found that the '15m protection screen' was not part of the Floating Pontoon by failing to take into account the plaintiff's preliminary drawings and the defendant's revised quotation dated 4.6.2018 which clearly provides for the same;

(b) The adjudicator had failed to observe natural justice by going off on a frolic of his own to allow the defendant's claim upon a basis which has not been argued or put forward in their pleadings, namely; the Adjudication Claim; Adjudication Response and Adjudication Reply by either party, i.e. the Certificate of Practical Completion which the adjudicator obtained from Malaysia Audit General's report via public domain — under Laporan Ketua Audit Negara- Pengurusan Aktiviti dan Pengurusan Syarikat Kerajaan Negeri — Sarawak — Tahun 2018 Siri 2 page 43 (chapter 2-5) . The plaintiff was not given the opportunity to comment on the Certificate of Practical Completion of the project (untested evidence) before the adjudicator issued his decision;

(c) The adjudicator had acted in excess of his jurisdiction by relying on the material found in the internet which was not raised by both the plaintiff and the defendant in their said pleadings when the adjudicator knows or ought to have known that the untested evidence is decisive or of

considerable potential importance to the outcome of the adjudication matter. The untested evidence obtained by the adjudicator from the internet resulted in the wholesale dismissal of the issues raised by the plaintiff in their Adjudication Response;

(d) The adjudicator had failed to consider the issues raised by the plaintiff in their Adjudication Response or at all; and

(e) Other grounds as set out in the Affidavit in Support affirmed by Mr Ting Yew King filed together herein.

[13] However, learned counsel for Jumsar in her written submissions confined herself to the grounds of breach of natural justice.

[14] Learned counsel's final written submissions (encl 23) in pertinent part read as follows:

2. The plaintiff is seeking to set aside the adjudication decision on two (2) grounds. Both of which are on the grounds of breach of natural justice. They are:

(a) First Ground — the adjudicator had gone on a frolic of his own to decide the adjudication decision by relying on a statement that the CPC for the project has been issued contained in the Malaysia Audit Report without referring the CPC to and/or giving a chance for the parties to be heard on the same; and

(b) Second Ground — the adjudicator had erred in deciding that the Protection Screen was never part of the Floating Pontoon.

Jumsar's first ground: The adjudicator had gone on a frolic of his own to decide the adjudication decision by relying on a statement that the CPC for the project has been issued contained in the Malaysia Audit Report without referring the CPC to and/or giving a chance for the parties to be heard on the same.

[15] Firstly, the court will note the submission of learned counsel has mischaracterised the adjudication decision.

[16] As has been pointed out earlier, there were basically two issues of contention between the parties in the adjudication proceedings.

[17] The primary issue was whether under the contract between the parties, Robin Dockyard was to supply and install a protection screen for the floating pontoon or was merely to install a protection screen (with the provision of the protection screen the responsibility of Jumsar or others).

[18] The secondary issue was whether at the time of delivery of the floating pontoon by Robin Dockyard to Jumsar, the floating pontoon had any defects.

[19] The certificate of practical completion the ('CPC') was merely one of the factors the adjudicator had taken into consideration, in ruling in favour of Robin Dockyard on the secondary issue whether there were defects. A

[20] The adjudicator did not rely on the CPC in his reasoning and ruling in favour of Robin Dockyard on the primary issue whether Robin Dockyard was to supply the protection screen, on top of installing the screen. B

[21] Thus, learned counsel was erroneous in saying to the effect that the adjudicator had based his whole decision on the CPC, when the CPC was merely one of the factors the adjudicator had taken into account in his ruling on the secondary issue. C

[22] Secondly, this court is unable to agree with learned counsel's contention that the fact the adjudicator did not ask the parties to comment on the CPC, amounted to a breach of natural justice. D

[23] In the first place, the role of an adjudicator is different in many respects from a judge or judicial officer. E

[24] Under the statutory scheme, an adjudicator not only has the role of adjudicating the merits of the material and arguments presented by the parties, an adjudicator also has the powers to 'draw on his own knowledge and expertise' and to 'inquisitorially take the initiative to ascertain the facts and the law required for the decision' (see s 25 of the CIPAA Act 2012). F

[25] The adjudicator in the instant adjudication proceedings had done exactly that on the secondary issue whether the floating pontoon had defects at the time of delivery. G

[26] The adjudicator had drawn upon his knowledge and expertise to surmise that a CPC would have been issued if the project had been deemed completed and had taken the initiative to verify that a CPC was indeed issued, from the auditor general's report. H

[27] The pertinent part of the adjudication decision is reproduced below:

> 93. On the matter of defects found on the pontoon, the claimant contends that it was caused by the wear and tear effect, due to improper selection of site/preparation or riverbed to receive the pontoon during low tide season. The claimant provided clear photo showing pontoon rested riverbed. However even the argument is true, it cannot be concluded that the detected defects were appeared after the handling over from Claimant to Respondent. It could be possible that the pontoon was already damaged before it was handed over to the Respondent. I

94. The respondent argues that the pontoon was already damaged before it was handed over by the claimant, and provided some photo to prove his case. The quality of the photo was poor and the claimant in his adjudication reply raise doubt on authenticity of the photo and suggest the photo may be manipulated. Even giving the benefit of doubt and assuming the photo provided by the respondent was not manipulated, it is still possible that by the time photo was taken, the wear and tear on the pontoon already begun.

95. Thus, both photos provided by the claimant and respondent, although different in clarity and sharpness, cannot give a conclusion that the pontoon was in good condition or not during the time of handling over from claimant to the respondent.

96. The claimant in his adjudication claim and adjudication reply, had used newspaper extract of politician/government officials declaring the project was completed to prove that the pontoon was in good condition during the time of handling over as the mentioned personnel declaring the project was completed technically fit.

97. Not questioning the integrity of the related politician/government officer but such declaration on media cannot be a firm proof that the actual condition of the finished work is technically fit and in good condition. There might also be error in reporting in media.

98. Although both Claimant and Respondent did not provide me with any details of progress certificate form the consultant or client on the project, I was able to obtain Malaysia Audit General's report via public domain. Under Laporan Ketua Audit Negara — Pengurusan Aktiviti Dan Pengurusan Syarikat Kerajaan Negeri — Sarawak Tahun 2018 Siri 2 p 43 chapter 2–5), it provides that the project had obtained its Certificate of Practical Completion (CPC) on 18 October 2018.

99. If the defects on the pontoon existed before 18 October 2018, the CPC cannot be issued out. Therefore, I determined that during the point of handling over the pontoon is deemed to be in compliance to the drawing, specification, and condition to be fit for handling over.

100. To further reinforced the position, there was no notice of non-compliance ever issued by consultant or client or respondent during the course of construction/launching of the pontoon.

[28] The gravamen of Jumsar's complaint is that Jumsar was not given an opportunity to comment on the CPC.

[29] This argument naturally leads to the following question: if Jumsar had the opportunity to comment on the CPC, just what would Jumsar have commented or submitted?

[30] The pertinent part of Jumsar's affidavits is reproduced below:

Affidavit in Support (Enclosure 2)

40. I am advised and verily believed that should the adjudicator had felt that the CPC was material for the purpose of the adjudication proceedings, the adjudicator

ought to have brought the same to the attention of the parties so that the parties had opportunity to comment on it, especially when it is on something which is either decisive or of considerable potential importance to the outcome of the resolution of the disputed. As a consequence of the adjudicator's action, the plaintiff's issues raised in their Adjudication Response were not fully addressed by the adjudicator or at all.

41. In the circumstances, I am advised and verily believe that the adjudicator had breached the rules of natural justice and/or acted in excess of his jurisdiction by going off on a frolic of his own, that is, to decide the adjudication based on untested evidence which has not been brought up or addressed by both the plaintiff and the defendant.

Affidavit in Reply (Enclosure 9)

20. Paragraph 29 of the AIO is denied. As regard to the Laporan Ketua Audit Negara, Pengurusan Aktiviti Agensi Dan Pengurusan Syarikat Kerajaan Negeri Sarawak Tahun 2018 Siri 2 ('Audit Report')(See: Exhibit RDE-1 of the AIO), I am advised and verily believe that the Audit Report was untested evidence and that the adjudicator had went on a frolic on his own by deciding the case based on the Audit Report and I repeat paragraphs 38 to 41 of the AIS. I further aver that the CPC stated in the Audit Report was one which was issued by DBKU, the client of the project to Autopower Sdn Bhd, the main contractor of the project. The CPC does not concern the plaintiff and the defendant and the plaintiff and the defendant were at all material times not privy to the CPC.'

[31] Learned counsel for Jumsar on her part submitted as follows in her final written submissions (encl 23):

15. Aside from the fact that the adjudicator in deciding the adjudication proceedings based upon the Malaysia Audit General's Report and the statements therein which were never argued nor put forward by either side, had breached the rules of natural justice as parties were not given the opportunity to comment/argue on it, we humbly submit that should the plaintiff be given the opportunity to argue/comment on it, the plaintiff would then have been able to bring to the attention of the adjudicator that:

(a) the plaintiff is, at all material times, not the main contractor, but subcontractor of the project. The CPC was issued to the main contractor by the Client and the parties are not privy to the issuance of the CPC;

(b) the CPC maybe a CPC for sectional completion of the project. This is probably the case based the fact that in the Malaysia Audit Report, it is stated at page 2-3 (See : RDE -1 of Encl. 6) that:

'Perangkap sampah belum dilaksanakan secara kekal menyebabkan tapak projek berisiko untuk tenggelam dilanggar oleh timbunan sampah dan kayu balak'

English translation:-

The Protection Screen has not been installed permanently thereby causing the project site to be at risk of sinking due to collision from rubbish and timber ...

[32] On the first argument, the fact that the CPC was issued to the main contractor by the client and that the parties might not have been privy to the issuance of the CPC, was completely irrelevant to the issues in the adjudication proceedings.

[33] Not only was it completely irrelevant, adjudicators with their experience and expertise in construction matters, would know who a CPC would be issued to and by whom, and whether subcontractors would be privy to the issuance.

[34] Therefore, this comment about the issuance of the CPC and whether the parties would be privy to the issuance, if the comment had been made, would be stating something that is not only irrelevant, but also obvious.

[35] On the second argument that the CPC 'maybe a CPC for sectional completion of the project', the court will note Jumsar never said that in its affidavits.

[36] This argument is pure speculation from the Bar by learned counsel.

[37] Learned counsel further argued the sentence from the auditor general's report 'Perangkap sampah belum dilaksanakan secara kekal menyebabkan tapak projek berisiko untuk tenggelam dilanggar oleh timbunan sampah dan kayu balak', would support her speculation that the CPC was probably just a sectional CPC.

[38] The court finds this argument to be devoid of any logic or basis.

[39] If indeed the CPC was merely a sectional CPC not relating to the floating pontoon, Jumsar should simply put forward the evidence showing so in its affidavits, instead of having its learned counsel engage in unfounded speculation.

[40] As was noted by the learned judge in *Xtreme Engineering Sdn Bhd v Paragon Promenade Sdn Bhd* [2019] 1 LNS 113, practical completion of a project denotes 'a state of affairs in which the works have been completed free from patent defects other than ones to be ignored as trifling'.

[41] Thus, a CPC is not conclusive evidence that there were no defects, in that there could be defects that were not patent i.e latent.

[42] The adjudicator did not regard the CPC as conclusive, as he made clear in para 100 of the adjudication decision where he noted that in addition to the

CPC, Robin Dockyard's case was fortified by the fact that neither 'the consultant or client or respondent [Jumsar]' had complained of any defects, whether during construction stage or during the launch:

> 100. To further reinforced the position, there was no notice of non-compliance ever issued by consultant or client or respondent during the course of construction/launching of the pontoon.

[43] With respect, in the view of this court, learned counsel was clutching at proverbial straws in the abovementioned submissions.

[44] Furthermore, it is trite a breach of natural justice has to be material before a court would set aside any part of an adjudication decision impacted by the breach.

[45] Even if assuming solely for the sake of argument there was a breach of natural justice in Jumsar not being asked to comment on the CPC, was the breach material?

[46] As noted earlier, the issuance of the CPC was merely one of the factors the adjudicator had relied upon, in ruling in favour of Robin Dockyard on the secondary issue whether the floating pontoon had defects at the time of delivery.

[47] Looking at the adjudication decision as a whole, it is clear to this court the adjudicator had considered the weight of evidence to be against Jumsar on the secondary issue, even without the CPC.

[48] As the adjudicator pointed out, there was no complaint of any non-compliance as regards the floating pontoon, whether from the consultant or the client or Jumsar at any time during the construction or launching of the floating pontoon.

Jumsar's second ground: The adjudicator had erred in deciding that the protection screen was never part of the floating pontoon.

[49] This second ground was described in the following terms in Jumsar's originating summons (encl 1):

> (a) The adjudicator had made a serious mistake in his findings of fact. The adjudicator erred when he found that the '15m protection screen' was not part of the Floating Pontoon by failing to take into account the plaintiff's preliminary drawings and the defendant's revised quotation dated 4.6.2018 which clearly provides for the same.

[50] In every dispute, there are two sides to the story and the person adjudicating the dispute has to decide which side should prevail.

[51] It cannot be that just because the adjudicator rules in favour of one side, it would amount to a breach of natural justice for the losing side.

[52] Here the adjudicator in the adjudication decision had considered the parties' respective case before deciding in favour of Robin Dockyard.

[53] Naturally as the losing party Jumsar would feel aggrieved and would contend the adjudicator had erred.

[54] However, as long as the parties had been given the opportunity to present their case and the adjudicator had considered the parties' respective case before deciding, no breach of natural justice would flow simply from the adjudicator deciding the case in favour of one party against the other.

[55] There is nothing in the adjudication decision to suggest the parties had been deprived of the opportunity to present their case or that the adjudicator had failed to consider the parties' respective case before deciding.

[56] The adjudicator had set out in detail the parties' respective case in paras 44–83 of the adjudication decision.

[57] In respect of the primary issue whether Robin Dockyard was to supply the protection screen on top of installing the screen, the adjudicator had set out his reasons for deciding in favour of Robin Dockyard in paras 86–92 of the adjudication decision:

> 86. Upon examined the final signed revised Quotation (Ref No. RDE/RT/TSSB-Quo-001/322/Rev3/mtc) dated 4th June 2018 by the Claimant duly confirmed and accepted by the Respondent on 5th June 2018, I determined that the nature of the contract would be bid and build — LUMP SUM without quantity basis.
>
> 87. Under bid and build, the contractor is not liable for the performance of the design but it is his obligation to make sure the workmanship and material satisfy the drawing and specification requirement.
>
> 88. It is worth to mention here that for a lump sum contract without quantity, the quantity breakdown of the work is not given by owner and contractor have to come up with his own bill of quantity, bearing the risk on miscalculation of quantities of material. For owner's obligation is to come out with accurate design (drawing and specification).
>
> 89. Under the above said contract administration, any mismatch of bills of quantity presented by the contractor cannot be a basis of submitting extra claim to the owner

and in similar fashion, owner cannot deduct contractor's contract sum due to the mismatch between bills of quantity prepared by the contractor and the design specified by the owner.

90. Under the above said contract administration, any variation to the design (drawing or specification etc) will trigger variation order and contribute to the addition/deduction to the original contract sum.

91. Having examined the contract drawing, I find no place in the drawing indicates the 15m protection screen, or any indicator on where to install/received such screen on any part of the pontoon.

92. Therefore, I determined that the absence of '15m protection screen' in completed Pontoon does not constitute any omission of work from the contract because of the nature of the contract. With this, issue raised in paragraph 84 b is extinguished.

[58] In respect of the secondary issue whether the floating pontoon had defects at the time of delivery, the adjudicator had set out his reasons for his finding in paras 93–100 of the adjudication decision, which paragraphs have been reproduced earlier herein at para 27.

[59] A party may disagree with the reasoning or the decision, but to say this amounts to a breach of natural justice would require several leaps of deductive logic which no court will countenance.

[60] Finally, as Jumsar's application for a stay and opposition to Robin Dockyard's application to enforce the adjudication decision was premised on Jumsar's application to set aside the adjudication decision and the same grounds as stated in the application to set aside, this court in dismissing Jumsar's application to set aside the adjudication decision also dismissed Jumsar's application for a stay and allowed Robin Dockyard's application to enforce the adjudication decision.

Order accordingly.

Reported by Nuzul Fitrie